No. ___ 061073 [illegible] 2006

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IN THE

Supreme Court of the United States

KATHY BLIESNER,

Petitioner,

v.

THE COMMUNICATION WORKERS OF AMERICA; VERIZON NORTHWEST, INC., fka GTE NORTHWEST, Incorporated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a "hybrid" claim (under section 301 of the Labor Management Relations Act codified at 29 U.S.C. § 185) brought by an employee against: an employer for breach of a collective bargaining agreement; and against a union for breach of its duty of fair representation—may a court first consider and dismiss the claim against the employer, prior to ever considering the claim against the Union?

2. If a court may, in fact, dismiss the claim against the employer prior to considering the claim against the Union, is the dismissal of the claim against the employer necessarily dispositive of the claim against the Union?

3. Did the Ninth Circuit Court of Appeals err in holding that the Federal District Court did not abuse its discretion in striking portions of the Petitioner's affidavit regarding her belief as to the time necessary for training in the new position, while admitting portions of Respondents' affidavits on the same issue?

4. Did the Ninth Circuit err in affirming the District Court's grant of summary judgment, despite the fact that said decision(s) weighs the relative evidence introduced by the Petitioner and Respondents and does so in a light most favorable to the moving party?

LIST OF PARTIES

The parties are as listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Bliesner v. Communication Workers of America*, 464 F.3d 910 (9th Cir. 2006). The opinion was filed September 13, 2006. The Ninth Circuit affirmed the March 31, 2004 decision of the United States District Court for the District of Idaho, which was not reported, but which is attached as Appendix Exhibit A. *See* Appendix Exhibit A.

STATEMENT OF JURISDICTION

The Opinion of the Court of Appeals was entered on September 13, 2006. *See* Appendix Exhibit C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 301 of the Labor-Management Relations Act, codified at 29 U.S.C. § 185:

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Federal Rule of Civil Procedure 56:

(c) Motion and Proceedings Thereon.

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

. . .

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Federal Rule of Evidence 602:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but not need, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

STATEMENT OF THE CASE

1. Federal Jurisdiction in the court of first instance was based upon a federal question pursuant to 28 U.S.C. 1331—"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

2. This case arises as the result of Petitioner's loss of her employment with Respondent Verizon via a lay off. Following the lay off, Petitioner, pursuant to the collective bargaining agreement in effect, attempted to bump a less senior employee in order to retain her employment with Respondent Verizon. Respondent Verizon wrongfully denied Petitioner's requested bump, alleging that she could not bump as she could not learn the new position within the time allowed under the collective bargaining agreement. Petitioner then filed a grievance through her union, Respondent Communication Workers of America. Respondent Communication Workers of America failed to process Petitioner's grievance properly and in a timely manner, resulting in an arbitration decision in favor of Defendant Verizon. Said decision was specifically based on Respondent's Communication Workers of America failure to timely process the grievance to arbitration.

3. As a result of the arbitrator's decision of June 7, 2002, Petitioner filed the original action against Respondents in Federal District Court. The original action alleged a breach of the applicable collective bargaining agreement by Respondent Verizon and a breach of the duty of fair representation by Respondent Communication Workers of America. On August 1, 2003, Respondents filed motions for summary judgment. On March 31, 2004, Federal District Court Judge Edward J. Lodge, without entertaining oral argument, entered an Order granting summary judgment to both Respondents and dismissing Petitioner's entire case. This decision was based on the Court's finding that: 1) Petitioner's affidavit should be stricken as it was "self serving"; 2) With the striking of Petitioner's affidavit, there remained no question of fact regarding whether or not Petitioner could have learned the position within the time allowed; 3) Therefore Petitioner could not establish a claim against Respondent Verizon;

4) This deemed Petitioner's claim against Respondent Communication Workers of America moot. [1]

> *". . . the Court finds that there are no material issues of genuine fact and summary judgment should be granted in favor of Verizon . . . the Court finds the language in the CBA agreement to be unambiguous . . . (and to) create a requirement that an employee applying to bump into a position must be qualified to work the tasks of the incumbent employee or be able to acquire the necessary qualification (sic) one week of refresher training . . . therefore the question becomes was the bump denial by Verizon proper . . . it is undisputed that Ms. Bliesner was not qualified for the position without further training . . . the affidavit of Jeannie Sully . . . indicates the training time . . . is a few weeks . . . the Court agrees that Ms. Bliesner's statements that she could have trained in one week or less are conclusory, self-serving and do not create a material issue of genuine fact . . . as a matter of law . . . Verizon did not violate the CBA and is entitled to summary judgment . . . because the Court finds that plaintiff has failed to survive summary judgment as to her claim against Verizon, her claim against the union also fails . . . the Court need not address the union's alleged failure . . .* [2]

4. On April 9, 2004, Petitioner filed a motion for reconsideration, which was denied by the Federal District Court on July 1, 2004. Said motion argued that the Court had erred in: 1) Considering Petitioner's claim against the employer prior her claim against the Union; 2) Dismissing Petitioner's claim against the Union solely on the basis of the Court's decision regarding her claim against the Employer; 3) Striking the affidavit of Petitioner; 4) Weighing the evidence; and 5) Fail-

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[1] Order of Federal District Court of March 31, 2004, Appendix Exhibit A.

[2] *Id.*

ing to consider the alleged facts in a light most favorable to the non-moving party. [3]

5. On July 26, 2004, Petitioner timely filed a Notice of Appeal with the Ninth Circuit Court of Appeals. In that appeal Petitioner made arguments nearly identical to those contained in her motion for reconsideration. The Ninth Circuit's decision was filed on September 13, 2006. The Ninth Circuit's decision fully supported the Federal District Court's decision, on a near identical basis. [4]

6. On December 8, 2006, Petitioner timely files this petition to the United States Supreme Court requesting review on the basis set forth in the following section. Said Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

REASONS FOR ALLOWANCE OF THE WRIT

The Ninth Circuit has incorrectly held that, in a § 301/ Unfair Representation "Hybrid" claim, even though the Unfair Representation claim is a condition precedent in order to prevail on the § 301 Breach of Collective Bargaining Agreement Claim, the District Court is free to decide the § 301 claim first. The Ninth Circuit has also incorrectly held that the dismissal of the § 301 claim warrants the automatic dismissal of the unfair representation claim, without consideration of any kind. The Ninth Circuit also wrongly affirmed the District Court's decision granting summary judgment to the Respondent Union on the grounds that its ruling dismissing the claim against the Respondent Employer required summary judgment in favor of the Union as well. Furthermore, the Ninth Circuit wrongly held that the District Court did not abuse its discretion in striking portions of the Petitioner's affidavit regarding the amount of training required for the position, while admitting affidavits on the same issue

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[3] Order of Federal District Court of July 1, 2004, Appendix Exhibit B.

[4] Ninth Circuit Opinion filed September 13, 2006, Appendix Exhibit C.

from employees of the Respondent therefore finding that there was no question of material fact regarding this issue.

I. THE NINTH CIRCUIT'S DECISION THAT THE DISTRICT COURT MAY DECIDE THE § 301 AND UNFAIR REPRESENTATION CLAIMS IN ANY ORDER IS IN CONFLICT WITH DECISIONS FROM THE FOURTH CIRCUIT ON THE ISSUE AND PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT.

According to the Fourth Circuit, in a "Hybrid" claim, "federal courts review allegations against employers for breach of collective bargaining agreements *only* when an employee has first proved that the union representing him breached its duty of fair representation." *Thompson v. Aluminum Company of America*, 276 F.3d 651, 657 (2002). The rationale behind this requirement is that, as a general rule, the employee is required to exhaust internal and/or arbitration remedies, prior to bringing a claim for the breach of the Collective Bargaining Agreement, and the employee may be bound by the result of exercising the procedure. *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 163 (1983). However, it is recognized that, if a union breaches its duty of fair representation, seeking such an internal remedy may be futile, and the finality of the arbitration may result in the denial of a potentially meritorious claim as a result of the breach. Therefore, the courts have allowed the employee to bring a hybrid unfair representation/301 claim against both the employer and the union. *Id.* at 164. In the case where it is determined that a union did not breach its duty of fair representation, the employee is then bound by the result of the arbitration under the agreement, and the claim against the employer must fail. *Id.* at 164–65.

However, it does not necessary follow that a breach of the collective bargaining agreement will excuse a union from its

duty of fair representation. This Court has held that, in deciding a claim for unfair representation, "[it has] never required a fair representation plaintiff to allege that his *employer* breached the agreement in order to prevail." *Breininger v. Sheet Metal Workers Int'l Assoc. Local Union No. 6*, 493 U.S. 67, 81 (1989). Although several cases do state that a Plaintiff must prevail on both claims in order to recover against either Defendant, *DelCostello*, 462 U.S. at 165, it is implicit in those holdings that a Plaintiff is pleading, and a court is deciding, the issues in the correct order. For example, in a claim against a union, but not the employer, if it is decided that a union did not breach its duty, then, of course, it is not liable in any event. In a claim against the employer, but not a union, if it is first decided that the union did not breach its agreement, then the employer is protected by the results of arbitration. If the Union did breach its duty, but the employer did not breach its agreement, then the employer is simply not liable.

The decisions of the District Court and the Ninth Circuit that the order in which the two issues are decided is not relevant, and that a determination regarding the claim against the employer automatically protects the Union from liability for any possible breach of its duty of fair representation, is in conflict with the prior decision of the Fourth Circuit in *Thompson*, creating a conflict between the circuits on an issue of national importance. In its decision, the Ninth Circuit cites decisions from the Sixth Circuit, *White v. Anchor Motor Freight, Inc.*, 899 F.2d 855 (6th Cir. 1990), and the Seventh Circuit, *Talbot v. Robert Matthews Distrib. Co.* 961 F.2d 654 (7th Cir. 1992), in which the Courts of Appeals had affirmed decisions in which the issue over the collective bargaining agreement was decided without reaching the fair representation issue, making the conflict with the Fourth Circuit even more apparent.

Furthermore, the Ninth Circuit's decision was in direct conflict with the prior decisions of this Court in *Breininger*

and *DelCostello*. The cited cases from the Sixth and Seventh Circuits serve to show that such misinterpretation of this Court's precedent is not simply an isolated incident, but a situation in which this Court must provide further clarity and certainty. In today's age of mobility and nation-wide commerce, it is vital that this Court resolve these differences, and clarify its requirements for a successful claim in such a labor dispute, in the interests of uniformity, the efficient operation of interstate business, the ability of a union to represent its members effectively, and the ability of employees and employers to avail themselves of remedies available under federal law. By granting a Writ of Certiorari in this case, this Court has the opportunity to prevent much needless litigation over what precisely are the requirements for a "hybrid" 301/fair representation claim in the future.

II. THE NINTH CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S GRANT OF RESPONDENTS' MOTION TO STRIKE AND ENTRY OF SUMMARY JUDGMENT CONSTITUTED AN ERRONEOUS APPLICATION OF THE SUMMARY JUDGMENT STANDARD.

In its original decision, the Federal District Court struck the portion of the Petitioner's affidavit regarding the amount of training required in order to qualify for the position in question, basing its decision on a "lack of personal knowledge," while admitting the portion of the affidavit of an employee of Respondent Verizon on the same issue. The Ninth Circuit affirmed on the grounds that the District Court did not abuse its discretion in its decision to strike. *Bliesner v. Communication Workers of America*, 464 F.3d 910, 915 (9th Cir. 2006). Absent Petitioner's statement, the District Court held there was no longer a genuine issue of material fact, and therefore granted summary judgment on the issue of the alleged breach of the collective bargaining agreement.

However, there is no one better situated to determine her own abilities to learn a new skill than the person herself, and the other employee of Verizon (who had been with Verizon only two (2) years) was able to provide only an estimation as to how much time is required, on average, to train an employee to qualify for a new task. Petitioner had over twenty-five years experience at Verizon, and could certainly provide an estimate as to her abilities to learn the required skills. Federal Rule of Evidence 602 sets forth the rule regarding evidence constituting personal knowledge, and has been used as a direct analogy to the personal knowledge requirement of Federal Rule of Civil Procedure 56(e). *See, e.g., Bryant v. Farmers Insurance Exchange*, 432 F.3d 1114, 1123 (2005). Under Rule 602, courts have determined that "Personal knowledge can include 'inferences and opinions, so long as they are grounded in personal observations and experience.'" *United States v. Rodriguez*, 162 F.3d 135, 144 (1st Cir. 1998). Petitioner's long tenure at the Verizon provides such grounds. The alleged "conclusory" or "self-serving" nature of the statement go to weight, not admissibility, and certainly may be taken into account by the trier of fact. This amounted to the District Court's improper weighing of the evidence and failing to view the facts in a light most favorable to the non-moving party. Therefore, the District Court's decision to strike the statement constitutes a clear abuse of discretion, and the Ninth Circuit erred in affirming the ruling. Thus, there remains a genuine issue of material fact as to whether or not the collective bargaining agreement was breached, and the Ninth Circuit was in error.

Given the prominent role Rule 56 Summary Judgment plays in federal litigation, and the use of affidavits in support and in opposition to such motions, clarity on this issue is crucial. Thus, this Court should grant the Petition for Certiorari, and hear this issue, in order to correct and prevent such erroneous rulings from occurring in the future.

In light of the conflict between the Ninth Circuit's decision and the decision of the Fourth Circuit regarding the order in which the two related issues in a "hybrid" labor claim may be decided, and the fact that the Ninth Circuit's decision regarding automatic dismissal of the claims against the Union is in direct conflict with binding precedent established by this Court, it is vital that the Supreme Court of the United States hear and resolve this issue. The relationship of employee-union-employer, and their respective rights under federal law are of pressing national importance, especially in this age of heightened competition and our global economy. Furthermore, this Court must examine the Ninth Circuit's affirmation of the District Court's Order striking the Petitioner's opinion from her affidavit, and its subsequent effect on the summary judgment ruling. To allow such an erroneous ruling to stand without granting review would have adverse effects on our civil system, as it relates to an important tool of civil procedure.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant her Petition for a Writ of Certiorari and agree to review this matter.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

[Filed March 31, 2004]

Case No. CV02-256-N-EJL

KATHY BLIESNER,

Plaintiff,

vs.

COMMUNICATION WORKERS OF AMERICA,

and

VERIZON NORTHWEST, INC.,
(formerly GTE Northwest Inc.)

Defendants.

ORDER

Pending before the Court in the above-entitled matter are: Union Defendant Communication Workers of America's ("CWA") motion for summary judgment (Docket No. 36), Defendant Verizon Northwest Inc.'s ("Verizon") motion for summary judgment (Docket No. 40), Defendant Verizon's motion to strike portions of Bliesner's Affidavit (Docket No. 58), Plaintiff Kathy Bliesner's ("Bliesner") motion to amend her affidavit (Docket No. 60) and Bliesner's motion to strike portions of the affidavits of Underwood and Sully (Docket No. 65). Also pending are certain motions filed by Defendants related to the trial of the above-entitled matter.

Having fully reviewed the record, the Court funds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that

the decisional process would not be significantly aided by oral argument, these matters shall be decided on the record before this Court without oral argument.

Factual Background

Plaintiff Kathy Bliesner was employed by Defendant Verizon and was also a member of-the union, Defendant CWA. Verizon, formerly GTE Northwest Incorporated ("GTE"), had in place at during the course of Plaintiffs employment a collective bargaining agreement ("CBA"). The CBA expired on September 16, 1995, hut the parties agreed to continue the terms and conditions of 1992-1995 CBA in full force and effect during the relevant time of Plaintiff's employment with Verizon.

Plaintiff began working for Verizon (then know as GTE) in 1969 and had held various positions at various locations during her employment with Verizon. Several other positions were the result of "bumping." The CBA provides for reductions in force by Verizon. When a reduction in force occurs, employees with seniority may exercise "bumping" rights in order to get another position if their current position is being eliminated. An employee may bump into a position if the employee has the qualifications to perform the duties associated with the position or can easily acquire such qualifications with one week of training. When the 1992-1995 CBA was negotiated, Verizon included language in the CBA that matched the language and approach of bumping rights in the CBA with its other union the International Brotherhood of Electrical Workers ("IBEW Agreement"). This added language in the union agreement is where the requirement of only one week of training to acquire the necessary qualifications for the position an employee is trying to "bump" into comes from.

Due to a reduction in force in December of 1995, Ms. Bliesner was laid off from her Analytical Assistant position in

Coeur d'Alene, Idaho. Plaintiff submitted her application to bump into an Analytical Assistant position in the Moscow, Idaho Facilities Assignment Center ("FAC"). The duties of the Analytical Assistant position in Coeur d'Alene were different than duties at the Moscow FAC duties. It is undisputed the duties at the Moscow FAC[1] required:

1) paying bills and reporting expenses using an established code system;

2) entering payroll information;

3) maintaining employee information records on the Horizon system;

4) using telemail;

5) drafting company correspondence;

6) using Lotus 1-2-3 to develop and enter information on spreadsheets;

7) ordering and maintaining inventory on the Service Express System ("SES");

8) making line assignments using internal systems, Mechanized Assignment Records Keeping ("MARK") and Service Order Distribution System ("SODA");

9) performing work processing tasks with WordPerfect; and

10) tracking employee vacation, overtime and sick time.

Plaintiff admits that she did not possess all of the qualifications necessary for the position she desired to bump into, but she maintains she could learn the necessary skills in one

[1] The description of the requisite job duties were prepared prior to the reduction hi force by the prior incumbent to the Moscow FAC Analytical Assistant position and. Plaintiff acknowledged she has no reason to believe the above listing of duties is incorrect.

week for most skills and in a very short time for the other required skills.

The supervisor for the Moscow position, Pete Spellman, interviewed Plaintiff. Mr. Spellman decided based on Ms. Bliesner's answers, she was not qualified to bump into the position. A bump denial form was completed indicating the reasons for her denial: Plaintiff's skills and experience were deficient in her working knowledge and experience with (1) ordering supplies via SES; (2) processing and coding of departmental and employee expense vouchers; (3) updating of EIR's; (4) performance reviews; (5) Human Resources practices; and (6) MARK/SODA systems used to compile employee statistical information.

Plaintiff filed a grievance related to the bump denial. Verizon denied the first step of the grievance process in December 1995. During the three-step grievance process, Jeannie Sully, Service Center Manager—FAC and Union Representative Darle Ferians conducted a second interview of Ms. Bliesner. While Plaintiff does not remember the interview, Verizon again concluded Ms. Bliesner was not qualified for the Moscow FAC Analytical Assistant position. The three-step grievance procedure resulted in Ms. Bliesner's grievance being denied by Verizon in March 1996.

In April 1996, the CWA union provided written notice to Verizon requesting arbitration of the grievance. An application for an arbitration panel must be made by the CWA. In 1998, Plaintiff asked what was delaying the arbitration. The CWA union representative responded by letter in 1999 indicating the CWA union had decided not to pursue the grievance to arbitration. In April 1999, Plaintiff appealed the CWA's decision not to arbitrate her bump denial. In 2000 the CWA Executive Board determined the grievance should proceed to arbitration.

The grievance was arbitrated in October of 2001. An evidentiary hearing was held. No evidence was offered by the union's counsel regarding the five year delay in arbitrating the grievance. On December 7, 2001, the arbitrator dismissed the grievance as untimely. The CWA union filed two motions for reconsideration. The motions for reconsideration were denied.[2]

On June 7, 2002, Plaintiff filed her complaint in federal court alleging Verizon violated the terms of the CBA when it denied her application to bump into the Moscow position and the CWA union violated its duty of fair representation. The action is pursuant to § 301 of the Labor Management Relations Act, 29 U.S. C. § 185(a). Plaintiff seeks injunctive relief compelling Verizon to reinstate Plaintiff to her former position (with back pay and benefits), general damages and punitive damages. Verizon and the CWA union deny the allegations of Plaintiff.

Motion to Amend Affidavit of Bliesner

Plaintiff seeks to amend her affidavit (Docket No. 51) based on alleged typographical errors by the secretary handling the word processing relating to the affidavit for good cause shown, the motion is granted. The Court will consider the proposed amended affidavit of Ms. Bliesner attached as an exhibit to the Affidavit of Plaintiff s counsel (Docket No. 62) for purposes of ruling on the pending motions for summary judgment. Plaintiffs counsel is directed to file with the

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[2] Exhibit N to the Declaration of Marla Henken, Docket No. 45, indicates the first motion for reconsideration was denied in a letter dated February 8, 2002. Exhibit 0 to the same declaration is a letter from the arbitrator denying the second request for reconsideration and is dated January 22, 2002. The Court does not know if the denial of the second motion was actually February 22, 2002 and or if the second motion was considered prior to the first motion. Regardless, both motions for reconsideration were denied by the arbitrator.

Court forthwith a signed, original of the proposed amended affidavit attached to counsel's own affidavit.

Motions for Summary Judgment

1. Standard of Review

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. Rule 56 provides, in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Supreme Court has made it clear that under Rule 56 summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element which is essential to the non-moving party's case and upon which the non-moving party will bear the burden of proof at trial. *See, Celotex Cow v. Catrett*, 477 U.S. 317, 322 (1986). If the nonmoving party fails to make such a showing on any essential element, "there can be no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323.[3]

Moreover, under Rule 56, it is clear that an issue, in order to preclude entry of summary judgment, must be both "material" and "genuine." An issue is "material" if it affects the

[3] *See also*, Rule 56(c) which provides, in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set Forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

outcome of the litigation. An issue, before it may be considered "genuine," must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975) (*quoting First Nat'l Bank v. Cities Serv. Co. Inc.*, 391 U.S. 253, 289 (1968)). The Ninth Circuit cases are in accord. *See e.g., British Motor Car Distrib. v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371 (9th Cir. 1989).

According to the Ninth Circuit, in order to withstand a motion for summary judgment, a party

> (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

Id. at 374 (citation omitted). Moreover, the Ninth Circuit has held that where the moving party meets its initial burden of demonstrating the absence of any genuine issue of material fact, the nonmoving party must "produce 'specific facts showing that there remains a genuine factual issue for trial' and evidence 'significantly probative' as to any [material] fact claimed to be disputed." *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983) (citing *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1280 (9th Cir. 1979)).

The Ninth Circuit Court of Appeals has acknowledged that in recent years the Supreme Court, "by clarifying what the nonmoving party must do to withstand a motion for summary judgment, has increased the utility of summary judgment." *California Architectural Bldg. Prods, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987). As the

Ninth Circuit has expressly stated: "No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *Id.*

In addressing the application of the "Summary Judgment Test," the Ninth Circuit Court of Appeals has specifically explained that:

> A "material" fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the *substantive law* governing the claim or defense. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.

T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc., 809 F.2d 626, 630 (9th Cir. 1987) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)) (emphasis added).

Of course, when applying the above standard, the court must view all of the evidence in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 255 (1986); *Hughes v. United States*, 953 F.2d 531, 541 (9th Cir. 1992).

2. Analysis

Both Defendants have filed motions for summary judgment. Defendants argue the Complaint combines two causes of action commonly referred to as a hybrid § 301/fair representation claim, *DelCostello v. International Brotherhood of Teamsters and United Steelworkers of America, AFL-CIO-CLC*, 462 U.S. 151, 165 (1983). In order to prevail on a hybrid claim, the Plaintiff must prove both Defendants violated their duties, *i.e.*, Verizon violated the CBA and the CWA union violated its duty of fair representation. Failure to prove both claims, entitles both defendants to summary judgment in their favor. *Id., see also Hines v. Anchor Motor Freight*, 424 U.S. 554, 570-71 (1976), *Slevira v. Western*

Sugar Company, 200 F.3d 1218 (9th Cir. 2000). Plaintiff argues she does not need to prevail on both claims, but this argument is misplaced as it conflicts with the holdings of the applicable cases.

The Court will begin with the claim against Verizon. Did Verizon violate the terms oldie CBA when it denied Ms. Bliesner's application to bump? As to this issue, the Court finds there are no material issues of genuine fact and summary judgment should he granted in favor of Verizon. In. order to determine whether the CBA was violated, the Court reviews the language of the labor agreement at issue. The labor agreement is interpreted like any contract and the Court will apply the plain and literal meaning to the words used in the labor agreement. *Harris v. Warner & Swasey Company*, 729 F.Supp. 1146 (N.D. Oh. 1989). The Court will not consider extrinsic evidence unless it finds the labor agreement to the ambiguous. *Capa v. Wiseman*, 469 F. Supp. 437 (N.D. Ca. 1979).

Article 14 of the COEUR D'ALENE addresses reduction in forces. There is no dispute regarding the fact a reduction in force occurred in this case. The CBA states:

Section 14.5.1:

> The notified employee has the qualifications to perform the new job or can easily acquire the qualifications in accordance with Section 14.5.2.

Section 14.5.2:

> Employees who have previously held the job or performed all or a substantial portion of the duties required by the position will be provided with refresher training on-the-job for up to one (1) week. Employees who have no related experience hut the requirements of the job are such that they can bc readily learned without formal training shall bc given up to one

> (1) week of on-the-job training. The Company shall have the burden of proof for lack of qualifications for bump to an employee's current classification. The employee shall have the burden of proving qualifications for other than the employee's current classification. Employees exercising the above bumping rights who fail to satisfy job requirements after four (4) weeks on the job shall be laid off without further bumping rights. Layoff allowance shall be paid in accordance with Section 14.10 and 14.14.
>
> . . .
>
> Section 14.10
>
> Employees who bump shall be given a four (4) week period to satisfy the job requirements. During the four (4) week period, job performance will he evaluated. When mutually agreed between the Union and the Company the four (4) week period may be extended.

The Court finds the language in the CBA agreement to be unambigous. Moreover, the language had consistently been interpreted by arbitrators to the IBEW Agreement to create a. requirement that an employee applying to bump into a position must be qualified to work the tasks of the incumbent employee or be able to acquire the necessary qualification one week of refresher training. *See, e.g., Sheldahl, Inc.*, 78 Lab. Arb. (BNA) 706 (1982), *Dentsply International, Inc.*, 85 Lab. Arb. (BNA) 24 (1985), and *Greenville Steel Cr Co.*, 85 Lab. Arb. (BNA) 75 (1985). If allowed to bump (which did not happen in this case), the employee is still only allowed one week of training and then is evaluated in four weeks to see if they are meeting the requirements of the job.

Therefore, the question becomes was the bump denial by Verizon proper. Specifically, was Ms. Bliesner qualified for the Moscow position and/or could she acquire the necessary skills in one week? It is undisputed Ms. Bliesner was not

qualified for the position without further training. Ms. Bliesner admits in her affidavit (Docket No. 62) she had no training or experience of any kind in "MARK and SODA systems, the processing of expense vouchers, updating EIR's and performance reviews."

The deposition testimony of Ms. Bliesner (attached to the Declaration of Marla Henken, Docket No. 45.) indicates in addition to not having any experience with the MARK and SODA systems, the processing of expense vouchers, updating EIR's and performance reviews, she had limited experience with Lotus 1-2-3, had not used telemail,[4] she was unfamiliar with the basic functions of SES, limited experience with WordPerfect, she had not generated different kinds of company correspondence since the 1980s, she had no experience handling absence control procedures and she had no experience processing Family Medical Leave Act requests.

The affidavit of Jeannie Sully, Dispatch Resource Center Manager for Verizon's Pacific—Cascade Division and supervisor of Mr. Spellman (Moscow supervisor), Docket No. 43, indicates duties of the Moscow position were different than the current duties of Ms. Bliesner when she applied for the bump. Also, Ms. Sully indicates the training time for SODA is a one-day basic training class. The training time for a working knowledge of the MARK systems is a formal class that lasts 3 to 4 weeks and such skills are essential for the Moscow position. The training time for learning the system to pay bills and process expense vouchers is a few weeks.

Ms. Bliesner states in her affidavit "the skills necessary to perform said tasks could easily be learned by me in one week or less. I felt I was qualified to perform the duties." She also

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[4] In Ms. Bliesuer's affidavit in Support of Plaintiffs Reply [Response] to Motion to Strike, Docket No. 64, she states she misunderstood the deposition question regarding telemail and that she is familiar with TMAIL which is the same program as telemail.

states in her supplemental affidavit filed in response to the motion to strike portions of her affidavit "I was and am certain that I could have learned the skills within one week or less."

Defendants challenge the conclusory statements made by Plaintiff that she could be trained in one-week when no evidence is given to support this statement and she does not dispute that MARK training takes 3 to 4 weeks. The Court agrees that Ms. Bliesner's statements that she could have been trained in one week or less are conclusory, self-serving and do not create a material issue of genuine fact to survive summary judgment.

Rule 56(e) states in part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as other wise provided in this rule, must set forth *specific facts showing that there is a genuine issue for trial.*

"Only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment." *Bevene v. Coleman See. Services, Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). Affiant in this case has no personal knowledge that she could be trained in less time than asserted is necessary by Verizon. Rather, she believed she could learn all the skills in one week. This "belief" does not appear to be based on any evidence other than Ms. Bliesner had been an employee for a long period of time, therefore, she felt she could learn the necessary skills. While the Court does not doubt that Ms.

Bliesner could have eventually learned the necessary skills, the facts are undisputed that the time required to learn all of the undisputed essential and necessary skills for the Moscow position would exceed one week and the one-week time limit was a condition that must be satisfied before a bump request could he approved for the Moscow FAC position. Ms. Bliesner's affidavit statements that she believed she could learn in one week all the skills, without more (such as evidence the MARK training only takes a week instead of 3-4 weeks or other employees had completed such training in one week, or that SODA could be learned in less than one day, etc.), does not provide the specific facts required under Rule 56(e) necessary to create a basis for her "belief" The statements are conclusory and insufficient as a matter of law to survive summary judgment on this issue of whether she could be trained within one week.

Ms. Bliesner also stated in her affidavit that other employees have been allowed to bump into positions requiring more than one-weeks of training. She added a specific name, Jena Sherich, in her affidavit in support of her response to the motion to strike portions of her affidavit. The Court finds this isolated example, which is not supported by detailed facts of what skills Ms. Sherich did not possess and/or how long such skills took to acquire to he unpersuasive. The union contract allows that a hump request may be denied if the Company establishes the person cannot he trained in one-week for the position. The Company as provided undisputed evidence in this particular case the necessary training would take a minimum of 3 to 4 weeks. Having denied the bump request, the four week time period allowed for a person to get up to speed after one week of training in sections 14.5.2 and 14.10 does not apply even though it may have applied to Ms. Sherich's transfer.

Because the applicable language of the union contract is unambiguous and the evidence here this Court is undisputed

that Ms. Bliesner could not have been trained for the position she was requesting to bump into within one-week, the Court finds there is not genuine issue of material fact regarding the alleged violation of the CBA by Verizon. As a matter of law, based on the undisputed facts and reviewing the facts in a light most favorable to Plaintiff, Verizon did not violate the CBA and is entitled to summary judgment.

Because the Court finds Plaintiff has failed to survive summary judgment as to her claim against Verizon, her claim against the union also fails and the union is entitled to summary judgment in its favor. The Court need not address the union's alleged failure to timely process the request to arbitrate as there is no merit of Plaintiff's underlying claim of being improperly denied her request to bump.

Other Pending Trial Motions

Based on the Court's ruling on the motions for summary judgment, the other pending motions filed by Defendants which relate to the trial are moot.

ORDER

Being fully advised in the premises, the Court hereby orders;

1. Defendant Communication Workers of America's motion for summary judgment (Docket No. 36) is GRANTED.
2. Defendant Verizon Northwest Inc.'s motion for summary judgment (Docket No. 40) is GRANTED.
3. Defendant Verizon's motion to strike portions of Bliesner's Affidavit (Docket No. 5S) is GRANTED IN PART consistent with this Order.
4. Plaintiff Kathy Bliesner's motion to amend her affidavit (Docket No. 60) is GRANTED.
5. Plaintiff Bliesner's motion to strike portions of the affidavits of Underwood and Sully (Docket No. 65) is DENIED,

6. Defendant Verizon's motion to continue trial (Docket No. 70) and to bifurcate liability and damages (Docket No. 79) are MOOT.

7. Motions in limine filed by Defendants (Docket Nos. 74, 76, 78, 81) are MOOT.

SO ORDERED this 31st day of March, 2004.

/s/ Edward J. Lodge
EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

United States District Court
for the
District of Idaho
March 31, 2004

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 2:02-cv-00256

I certify that I caused a copy of the attached document to be mailed or faxed to the following named persons:

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Cameron S. Burke, Clerk

Date: 3-31-04

By: /s/ [Illegible]
(Deputy Clerk)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

[Filed July 1, 2004]

Case No. CV02-256-N-EM

KATHY BLIESNER,

Plaintiff,

vs.

COMMUNICATION WORKERS OF AMERICA,

and

VERIZON NORTHWEST, INC.,
(formerly GTE Northwest Inc.)

Defendants.

ORDER

Pending before the Court in the above-entitled matter is Plaintiffs Motion for Reconsideration (Docket No. 88). This Court entered an Order and Judgment dismissing Plaintiff's claims on March 31, 2004 (Docket Nos. 86 and 87). The motion, for reconsideration pursuant to Fed. R. Civ. P. 59 was filed on April 9, 2004. The Court finds the motion was timely filed.

Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this matter shall be decided on the record before this Court without oral argument.

The Ninth Circuit has identified three reasons sufficient to warrant a court's reconsideration of a prior order: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact, to prevent manifest injustice. *School Dist. No. 1J v. ACandS Inc.*, 5 17.3d 1255, 1263 (9th Cir. 1993). Upon demonstration of one of these three grounds, the movant must then come forward with "facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Donaldson v. Liberty Mut. Ins. Co.*, 947 F. Supp. 429, 430 (D. Haw. 1996).

Plaintiff argues this Court erred in determining there were no genuine issues of material facts on whether Verizon violated the Collective Bargaining Agreement ("CBA") and in determining Plaintiff could not proceed against the Union, notwithstanding the granting of summary judgment in favor of Verizon. Defendants responded Plaintiff has not met the legal standard to support reconsideration and Defendant Verizon requests sanctions.

The Court respectfully agrees with Defendants that Plaintiff has failed to establish any of the three recognized reasons to support reconsideration. First, Plaintiff does not argue there has been an intervening change in law. Second, Plaintiff does not offer any new evidence for the Court to consider. Third, while the Plaintiff disagrees with this Court's analysis, Plaintiff has failed to establish via binding precedent the need to "correct clear or manifest error in law or fact, to prevent manifest injustice." Absent these showings, reconsideration is improper.

As to the Court's finding of no material genuine issue of material fact on the contract claim against Verizon, Plaintiff argues the Court failed to consider the fact that Plaintiff was a long-time employee and that her statement that she could have learned the requisite skills in one week should allow her to survive summary judgment on whether the CBA was

violated. This argument ignores the Court's analysis set forth on pages 8-10 of the March 31, 2004. Order wherein the Court acknowledges Ms. Bliesner's long-term employment and her statement in her affidavit, hut finds the length of employment and other work experience were insufficient to refute the undisputed fact that certain necessary computer training for the position she desired to hump into took at least 3 weeks. Plaintiffs argument in the motion for reconsideration is not a new argument and such argument was previously rejected by this Court.

As to the Court's finding that Plaintiff filed a hybrid claim that required her to prevail against both Verizon for violating the CBA and the Union for breaching its duty of lair representation, the Court finds it applied the correct legal standard. Plaintiff is simply trying to re-argue a legal argument already presented to this Court. Let there be no misunderstanding, while Plaintiff may elect to sue only one party (either the employer or the union) or *both* the employer and the union, Plaintiff has the burden to prove both a breach of contract and a breach of the fair representation duty. The Supreme Court explained this burden in the case cited by this Court in its Order of March 31, 2004, *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 164-165 (1983):

> [Since] the two claims are inextricably interdependent . . . [t]o prevail against either the company or the Union, . . . [employee plaintiffs]must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of-duty by the Union, . . . [citations omitted]. The employee may, if he chooses, sue one defendant and Pot the other, but the case he must prove is the same whether lie sues one, the other or both.

Having found Plaintiff failed to prove her case against the company in the case at bar, the Court properly dismissed the claim against the union. Plaintiff's renewed argument based

on a quote in *Breininger v. Sheet Metal Workers Int'l Assn. Local Union 6*, 493 U.S. 67, 84, n.8 (1989) continues to be misplaced and is therefore rejected by this Court.

Being fully advised in the premises, the Court hereby orders the motion for reconsideration (Docket No. 88) is DENIED. However, the Court finds sanctions are not appropriate in this particular case.

SO ORDERED this 29th day of June, 2004.

/s/ Edward J. Lodge
EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

United States District Court
for the
District of Idaho
July 1, 2004

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 2:02-cv-00256

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___ Judge Thomas S. Zilly

Cameron S. Burke, Clerk

Date: 7-1-04

By: /s/ [Illegible]
(Deputy Clerk)

APPENDIX C

FOE PUBLICAITON
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Nov. 13, 2006]

No. 04-35702
D.C. No. CV-02-00256-EJL

KATHY BLIESNER,
Plaintiff-Appellant,
v.
THE COMMUNICATION WORKERS OF AMERICA; VERIZON NORTHWEST INC., fka GTE Northwest Incorporated,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted
May 4, 2006—Portland, Oregon

Filed September 13, 2006

Before: A. Wallace Tashima and William. A, Fletcher, *Circuit Judges*, and Louis H. Pollak,* *Senior District Judge*.

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* The Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION

W. FLETCHER, *Circuit Judge*:

Plaintiff Kathy Bliesner brings a hybrid fair representation § 301 suit against her union and her employer, alleging that her union breached its duty of fair representation in violation of the National Labor Relations Act and that her employer breached its collective bargaining agreement ("CBA") in violation of § 301(a) of the Labor Management Relations Act. The district court granted summary judgment against Bliesner on the ground that she had failed to establish that her employer breached the CBA. The district court did not address the question of whether the union breached its duty of fair representation.

Bliesner contends on appeal that the district court should not have reached the question of her employer's obligation under the CBA without first addressing the question of her union's duty of fair representation. We disagree. Bliesner had to prevail on both questions in order to survive the motion for summary judgment. We hold that the district court was not required to decide the questions in any particular order, and that it properly granted summary judgment against Bliesner after holding that the employer had not breached the CBA.

We also reject Bliesner's other claims of error.

I. Background

Bliesner began working for Verizon (then GTE) in 1969. She held various positions throughout her employment with the company. The Communication Workers of America ("CWA") represented Verizon employees. In 1995, Bliesner was laid off from her position as an Analytical Assistant in Coeur d'Alene, Idaho, pursuant to a reduction in force.

Under the terms of the governing 1992-1995 CBA, a senior employee could exercise "bumping" rights against a junior employee after a reduction in force, so long as the bumping

employee could be trained for the new position within the requisite time. Section 14.5.2 of the CBA provided:

> Employees who have previously held the job or performed all or a substantial portion of the duties required by the position will be provided with refresher training on-the-job for up to one (1) week. Employees who have no related experience but the requirements of the job are such that they can be readily learned without formal training shall be given up to one (1) week of on-the-job training.

Bliesner sought to "bump" into an Analytical Assistant position in Verizon's Facilities Assignment Center in Moscow, Idaho. It is undisputed that this position required knowledge of (1) paying bills and reporting expenses using an established code system; (2) entering payroll information; (3) maintaining employee information records; (4) using telemail; (5) drafting company correspondence; (6) using Lotus 1-2-3 to develop and enter information into spreadsheets; (7) ordering and maintaining inventory on the Service Express System; (8) making line assignments using the internal systems known as MARK and SODA; (9) performing word processing tasks with WordPerfect; and (10) tracking employee vacation, overtime, and sick time.

In her deposition, Bliesner admitted that she had no experience with paying bills or invoices under Verizon's billing codes and systems; had only limited knowledge of how to process expense reports; had never used the Horizon computer system, which maintains employee information; had never processed employee performance reviews; had never used telemail; had only limited knowledge of Lotus 1-2-3; had no familiarity with the basic functions of the Service Express System; had no knowledge of the MARK or SODA systems; had only very limited experience with WordPerfect; and had never handled or processed other employees' Family Medical Leave Act requests or expense reports. Bliesner later

stated in an affidavit that she had experience with Tmail, which is the same as telemail.

Peter Spellman, the supervisor of the Moscow facility, interviewed Bliesner for the position and concluded that she was not qualified for the bump. On November 21, 1995, a bump denial form was issued. The bump was denied on the ground that due to Bliesner's lack of experience and knowledge, she "would require substantial formal and or on the job training."

Bliesner, represented by CWA, filed a grievance. Grievances were handled under the CBA in a three-step process. At the completion of the third step, on March 19, 1996, Verizon denied Bliesner's grievance. Under the CBA, arbitration could be requested within thirty days of the completion of the three-step process. CWA requested arbitration on Bliesner's behalf on April 5, 1996.

Almost three years later, on March 25, 1999, CWA told Bliesner that it had decided not to pursue her claim to arbitration because it did not think the claim would be successful. Bliesner appealed the decision within the union. As a result of the appeal, CWA agreed to proceed to arbitration. It assigned an attorney to her case in November 2000. In December 2001, the arbitrator denied Bliesner's claim on the ground that CWA had not timely pursued her grievance in arbitration.

Bliesner then filed a hybrid fair representation/§ 301 complaint against CWA and Verizon in federal district court. She alleged (1) that CWA had breached its duty of fair representation, and (2) that Verizon had breached the CBA. The district court granted summary judgment to both CWA and Verizon, holding that Bliesner had not shown that Verizon had breached the CBA in denying her bumping request. Because it concluded there had been no breach of the CBA by Verizon, the district court did not address the question of whether CWA had breached its duty of fair representation.

Bliesner timely appealed to this court.

II. Standard of Review

We review de novo a district court's grant of summary judgment. *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). We must determine whether the district court properly applied the relevant substantive law and whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). We may affirm on any ground supported by the record. *Enlow v. Salem-Keizer Yellow Cab Co.*, 389 F.3d 802, 811 (9th Cir. 2004).

III. Discussion

Bliesner objects to the grant of summary judgment on several grounds. We address each in turn.

A. Order of Deciding Questions in a "Hybrid" Suit

A union owes a duty of fair representation to those it represents, and an employer must honor the terms of a CBA to which it is a party. An aggrieved party may bring a hybrid fair representation/ 301 suit against the union, the employer, or both. In order to prevail in any such suit, the plaintiff must show that the union and the employer have both breached their respective duties.

The Supreme Court has described a hybrid fair representation/§ 301 suit as follows:

> Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. Yet the two claims are inextricably interdependent. To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that

> their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union.

Del Costello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164-65 (1983) (citations and internal quotations omitted; alteration in the original). Whether the defendant is the union or the employer, the required proof is the same: The plaintiff must show that there has been both a breach of the duty of fair representation and a breach of the CBA. *Id.*

Bliesner contends that the district court erred by deciding that Verizon did not breach the CBA without first deciding whether CWA breached its duty of fair representation. It is true that a breach of a duty of fair representation by the union is a necessary prerequisite to a successful suit against the employer for a breach of the CBA. *See, e.g., Buford v. Runyon*, 160 F.3d 1199, 1201 (8th Cir. 1998) ("To prevail on her claim for breach of the collective bargaining agreement, Buford must show, as a prerequisite, that the Union breached its duty of fair representation."); *Vadino v. A. Valey Engr's*, 903 F.2d 253, 261 (3d Cir. 1990) ("The unfair representation claim is the necessary 'condition precedent' to the employee's suit."). It is also true that a hybrid fair representation/§ 301 suit cannot go to trial without some showing that the union has violated its duty of fair representation. *See Herman v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 971*, 60 F.3d 1375 (9th Cir. 1995) (allowing hybrid suit to go forward when plaintiff could survive a summary judgment motion on issue of fair representation).

But nothing requires the district court to decide the fair representation question first. *See, e.g., Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 664 (7th Cir. 1992) (affirming the dismissal of a hybrid suit where the district court held that the employer had not breached the CBA without reaching the fair representation issue); *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 557-58 (6th Cir. 1990) (same). In

this case, CWA and Verizon moved for summary judgment on two grounds—that Bliesner had failed to show either that CWA had violated its duty of fair representation or that Verizon had breached the CBA in violation of § 301. Evidently believing that the CBA § 301 question was easier to resolve, the district court held that Verizon had not violated the CBA. Having held that there was no violation of the CBA, the district court then granted summary judgment to both defendants on the ground that Bliesner had not prevailed on an essential element of her suit. Deciding the CBA question first is not merely permissible. It is also a normal and entirely sensible procedure frequently followed by a court confronted with two potentially dispositive questions, one of which is easier to resolve.

We therefore conclude that the district court did not err by resolving Bliesner's § 301 claim that her employer breached the CBA, and by granting summary judgment without addressing Bliesner's fair representation claim against the union.

B. Other Objections

Bliesner raises numerous other objections to the district court's decision. Some of them are moot in light of our holding that the district court acted properly in deciding the CBA § 301 question without reaching the duty of fair representation question. Others are overlapping and partially redundant. Reduced to their essentials, Bliesner has the following remaining objections.

1. Construction of the CBA

Bliesner contends that the district court misconstrued the CBA when it concluded that § 14.5.2 unambiguously required that an employee applying to bump into a position must be able to learn the necessary skills of the new job with either a week of formal refresher training, or a week of informal on-the-job training. We agree with the district court that the text of the CBA is unambiguous in stating that any neces-

sary training—whether formal refresher training or on-the-job training—must be achievable within a week.

2. Motions to Strike Portions of Affidavits

Bliesner contends that the district court erred in striking portions of her affidavit submitted in support of her motion for summary judgment, and in failing to strike portions of affidavits from two Verizon employees, Sully and Underwood. Under Federal Rule of Civil Procedure 56(e), affidavits must be based on personal knowledge. We review the district, court's ruling for an abuse of discretion. *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1038 (9th Cir. 2003).

It is clear from its order that the district court only struck those portions of Bliesner's affidavit concerning her own personal belief that she could be trained in one week. By her own admission, Bliesner was entirely unacquainted with many of the skills for which training would have been required. For example, there is evidence in the record that the MARK program—which was a necessary part of the new job—requires a three to four week training class. Bliesner stated in her deposition that she had no knowledge of the MARK system. Given Bliesner's lack of knowledge of the MARK system, the district court did not abuse its discretion in striking, for lack of personal knowledge, the portion of her affidavit stating that she could learn it in one week.

By contrast, the affidavits of Sully and Underwood were based upon their first-hand knowledge of the necessary skills for the job Bliesner sought, as well as the time needed to obtain those skills. The district court did not abuse its discretion in refusing to strike their affidavits or portions thereof.

3. Genuine Issues of Material Fact

Bliesner contends that there were genuine issues of material fact as to whether she could be trained within one week. We disagree. Verizon introduced evidence showing

that Bliesner lacked the necessary skills for the job she sought, and that she could not obtain those skills with one week of formal refresher training or on-the-job training. Bliesner sought to introduce evidence to the contrary by means of statements in her affidavits, but we have just held, *supra*, that the district court did not abuse its discretion in striking those statements for lack of personal knowledge.

4. Motion for Reconsideration

Finally, Bliesner contends that the district court erred in denying her motion for reconsideration. We review for an abuse of discretion a district court's denial of a motion for reconsideration. *Sheet Metal Workers Int'l Ass'n Local Union No. 359 v. Madison*, 84 F.3d 1186, 1192 (9th Cir. 1996). We hold that there was no abuse of discretion.

Conclusion

We hold that in a hybrid fair representation/§ 301 suit, a district court need not address a duty of fair representation claim before addressing a CBA § 301 claim. The district court committed no error in granting summary judgment against Bliesner. We affirm in all respects.

AFFIRMED.

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No. 06-1073

IN THE

Supreme Court of the United States

KATHY BLIESNER,

Petitioner,

v.

THE COMMUNICATION WORKERS OF AMERICA; VERIZON NORTHWEST, INC., fka GTE NORTHWEST INCORPORATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

VERIZON NORTHWEST, INC.'S (FKA GTE NORTHWEST INCORPORATED) RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pursuant to Rules of the Supreme Court of the United States, Rule 24.2, Respondent Verizon Northwest, Inc. ("Verizon") accepts the first two questions presented by Petitioner Kathy Bliesner's ("Petitioner") Petition for a Writ of Certiorari (the "Petition"). The third and fourth questions presented for review are more appropriately phrased as follows:

3. Did the Ninth Circuit Court of Appeals err by concluding that the U.S. District Court for the District of Idaho did not abuse its discretion in striking opinion testimony offered by Petitioner on the grounds that it was not based on personal knowledge, when that opinion testimony concerned Petitioner's belief about her ability to learn how to use computer systems that she admitted she had never worked with before?

4. Did the Ninth Circuit err in affirming the district court's grant of summary judgment?

RULE 14.1(b) STATEMENT

The caption contains the names of all parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Verizon Northwest, Inc. identifies Verizon Communications Inc. as its corporate parent. No other corporate entity owns 10 percent or more of Verizon's stock. Verizon Communications Inc. is a publicly traded corporation, and no corporate entity owns 10 percent or more of its stock.

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IN THE

Supreme Court of the United States

No. 06-1073

KATHY BLIESNER,

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v.

THE COMMUNICATION WORKERS OF AMERICA; VERIZON NORTHWEST, INC., fka GTE NORTHWEST INCORPORATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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VERIZON NORTHWEST, INC.'S (FKA GTE NORTHWEST INCORPORATED) RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This statement of the facts and posture of this case is drawn from the undisputed facts as identified by the district court and affirmed by the Court of Appeals. Petitioner has not objected to any determination of the undisputed facts[1] on

[1] Even as to those evidentiary rulings Petitioner does contest, (Petition, at pp. 9-10), Petitioner does not contest the undisputed facts on which basis the district court concluded that Petitioner lacked personal knowledge for her opinions.

which basis the district court granted, and the Ninth Circuit upheld, summary judgment to Respondents. Those decisions are attached to the Petition as Appendices A, B, and C.

This case involves a claim under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). Petitioner alleges that Verizon violated the controlling collective bargaining agreement in denying her application to "bump" a less senior employee after Petitioner was laid off and that the Communications Workers of America ("CWA" or the "Union") violated its duty of fair representation in the processing of her grievance over that bump denial.

Petitioner began working for Verizon (then known as GTE Northwest Incorporated) in June 1969. The Union has represented certain employees at Verizon since 1983. On December 1, 1995, Petitioner was laid off as part of a company-wide reduction in force. Under Article 14 of the governing collective bargaining agreement, a senior employee could exercise "bumping rights" to displace a less senior employee and take his or her job if the bumping employee has the qualifications to do "the job" with only one week of "refresher" training.

By her own admission, Petitioner had no knowledge of or experience in many of the skills and tasks required to perform the position into which she was requesting to bump. The skills that Petitioner admitted not possessing included paying bills and processing expenses, using a computer system called "SODA," and using a separate computer system called "MARK." Thus, for these skills Petitioner would require initial training, not refresher training. Moreover, it was undisputed that it takes a few weeks to learn the system for paying bills and processing expenses; it was undisputed that a one-day basic training class is necessary to learn SODA; and it was undisputed that MARK requires a three- to four-week formal class. Based on these undisputed facts, the skills necessary to perform the position into which Petitioner

attempted to bump required more than one week of training. Verizon denied Petitioner's bump application.

Article 9 of the collective bargaining agreement provides for a three-step grievance procedure to grieve the bump denial. Petitioner's grievance was timely processed through all three steps of the grievance procedure. On March 19, 1996, at the conclusion of the third step, Verizon maintained its determination that Petitioner's bump request was properly denied.

Under the collective bargaining agreement, arbitration could be requested within thirty days of the completion of the grievance process. On April 5, 1996, the CWA timely provided written notice to Verizon to request arbitration of Petitioner's grievance. The Union did not, however, immediately move the case into arbitration as it continued to investigate. In a letter dated March 25, 1999, the CWA notified Petitioner of the Union's decision not to pursue her grievance to arbitration because, based on Verizon's supporting documentation, the Union did not think it would be successful. On April 7, 1999, Petitioner appealed the CWA's decision through the Union's internal appeal procedures and as a result, the Union agreed to proceed to arbitration.

Petitioner's grievance was arbitrated in October, 2001. On December 7, 2001, the Arbitrator dismissed the grievance as untimely. The Union's two motions for reconsideration were denied.

On June 7, 2002, Petitioner filed a hybrid section 301/ fair representation complaint against CWA and Verizon in federal district court. As she must, Petitioner alleged (1) Verizon violated the collective bargaining agreement in denying her bump application and (2) the CWA breached its duty of fair representation in handling her grievance. The district court granted summary judgment to both the Union and Verizon, holding that Petitioner had not shown the essential element

that Verizon had breached the collective bargaining agreement in denying her bumping request. Because it concluded that there had been no breach of the collective bargaining agreement, the district court did not address whether the Union breached its duty of fair representation and dismissed the action against both Verizon and the CWA. (*See* Petition, Appendix A, District Court Order and Judgment dated March 31, 2004.)

After the district court denied Petitioner's Motion for Reconsideration, she filed a Notice of Appeal on July 26, 2004. In its de novo review of the district court's grant of summary judgment, in which it upheld the granting of summary judgment against the Petitioner, the Ninth Circuit correctly held that in a hybrid section 301/fair representation suit, a district court need not address the duty of fair representation claim before the breach of the contract claim. *Bliesner v. Comm'n Workers of Am.*, 464 F.3d 910, 915 (9th Cir. 2006). The Ninth Circuit also correctly held that the district court did not abuse its discretion in striking the portion of Petitioner's affidavit stating that she could learn the MARK system in one week. *Id.*

ARGUMENT

I. The Ninth Circuit Correctly Applied Well-Settled Federal Law in Concluding That in a Hybrid Claim, There Is No Requirement to Consider the Fair Representation Claim Before Considering Whether There Was a Breach of the Collective Bargaining Agreement.

In analyzing a hybrid claim, there is no particular order in which the claims must be addressed. Petitioner erroneously asserts that the Ninth Circuit's decision (concluding that in a hybrid claim, the claims may be considered in any order) is in conflict with the Fourth Circuit and prior decisions of the U.S. Supreme Court. This is just wrong, on many levels.

Petitioner's theory is not well grounded on this Court's explanation of the nature of a hybrid section 301/fair representation action. Imposing such a requirement is contrary to any notion of judicial economy, especially in those circumstances when it is clear that that the collective bargaining agreement has not been breached—a determination that disposes of the entire claim. Finally, Petitioner's theory is not based on a fair reading of the cited Fourth Circuit decision—the only support offered for her novel and erroneous interpretation of the law.

A. It Is Well Established That to Succeed in a Hybrid Claim, Petitioner Must Prove Both a Breach of the Collective Bargaining Agreement and a Breach of the Duty of Fair Representation.

Petitioner alleges that Verizon breached the collective bargaining agreement in denying her bump application and terminating her employment. Petitioner further alleges that the Union's delay in handling her grievance constituted a breach of its duty of fair representation. It is well settled that such a claim as that raised by Petitioner combines two causes of action, and is commonly referred to as a hybrid section 301/fair representation claim. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 165 (1983). The success of Petitioner's claim depends on the viability of two allegations: (1) the employer breached the collective bargaining agreement; and (2) the Union breached its duty of fair representation. Failure to establish *either* element is fatal to a hybrid claim:

> Yet the two claims are inextricably interdependent. To prevail against either the company or the Union, . . . [employee-plaintiffs Petitioners] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one de-

> fendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

Id. at 164-65 (ellipsis and brackets in original; internal quotation marks and citations omitted).

Petitioner concedes that her claim is a hybrid section 301/ fair representation claim, involving allegations of Verizon's breach of the collective bargaining agreement and the Union's breach of its duty to her. (Petition at 4-5.) However, Petitioner argues that a fair representation plaintiff need not allege the employer violated the collective bargaining agreement in order to prevail. (*Id.* at 8.) Plaintiff relies on *Breininger v. Sheet Metal Workers Intl. Assn., Local Union No. 6*, 493 U.S. 67, 81 (1989), to support that proposition. Petitioner is simply wrong to do so. *Breininger* involved only an allegation of discrimination by the union in its operation of its hiring hall. *Id.* at 71-72. Because the plaintiff in that case was not referred to potential employers, the plaintiff had no opportunity to work for an employer; thus, no claim against an employer could have arisen. *Breininger* is wholly inapposite to the case at bar.

It should therefore not be surprising that the process of which Petitioner complains—deciding hybrid section 301/fair representation claims on the basis of whichever claim can be most readily resolved—is routine in the federal courts. *E.g.*, *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559 (6th Cir. 1990) ("[I]f the first claim anchored in the employer's alleged breach of the [collective bargaining agreement] fails, then the breach of duty of fair representation claim against the union must necessarily fail with it."); *Laurin v. Providence Hosp.*, 150 F.3d 52, 61-62 (1st Cir. 1998) (absent requisite showing that hospital breached collective bargaining agreement, hybrid claim failed); *Nicholls v. Brookdale Univ. Hosp. & Med. Ctr.*, 204 F. App'x 40, 2006 WL 2990239 (2d Cir. 2006) (unpublished) (dismissing hybrid claim without considering whether hospital breached collective bargaining agree-

ment after determining that union did not breach its duty of fair representation); *Albright v. Virtue*, 89 F. App'x 769, 2004 WL 188333 (3d Cir. 2004) (unpublished) (court did not have to determine whether employer violated collective bargaining agreement after it determined that union did not breach its duty of fair representation); *Thompson v. Aluminum Co. of Am.*, 276 F.3d 651, 658 (4th Cir. 2002) ("Our conclusion that the Union did not breach its duty of fair representation resolves the case for Alcoa as well."); *Suter v. La. Philharmonic Orchestra*, No. 05-30824, 2006 WL 1877220 at *4, fn.6 (5th Cir. July 5, 2006) (slip op.) (because of resolution that employer did not breach collective bargaining agreement, court does not address district court's conclusion that union did not have duty of fair representation); *Higgins v. Int'l Union, Sec., Police, Fire Prof'ls of Am.*, 398 F.3d 384, 388 (6th Cir. 2005) ("Because the employees are unable to establish a genuine issue of material fact regarding their breach of contract claim against DaimlerChrysler, their remaining claim for breach of duty of fair representation under Section 301 must also fail."); *Crider v. Spectrulite Consortium, Inc.*, 130 F.3d 1238, 1243 (7th Cir. 1997) (recognizing that "[o]ur conclusion that Spectrulite did not breach the CBA when it fired Crider resolves the case for the Union as well," the court agreed with lower court's conclusion that claim against union would not survive summary judgment); *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654 (7th Cir. 1992) (affirming summary judgment; after finding employer did not breach collective bargaining agreement, it was unnecessary for district court to determine if union breached its duty of fair representation); *Slevira v. W. Sugar Co.*, 200 F.3d 1218, 1222 (9th Cir. 2000) (affirming summary judgment - after determining that claim against union failed, the court, without further analysis, held that claim against employer also failed); *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988) (affirming district court's dismissal of hybrid claim when

district court determined that union did not breach its duty of fair representation).

Contrary to Petitioner's unfounded assertion, there is no authority that requires the district court to decide the fair representation claim first.

B. Requiring That a Court Always First Consider the Breach of Duty of Fair Representation Claim Does Not Promote Judicial Economy and Intrudes on a Court's Analytical Process.

Requiring a court to first consider the breach of duty of fair representation claim before it addresses the claim of breach of the collective bargaining agreement is senseless and promotes unnecessary busywork. As outlined above, it is undisputed that to prevail in hybrid claim, the employee must assert both a valid contract claim and a valid duty of fair representation claim. If one claim fails, the hybrid claim is doomed in its entirety. If a court, based on the record before it, determines that one claim is easier to resolve, it is practical, economical, and within its discretion for it to address that claim first, especially when a quick resolution of one element could dispose of the hybrid claim in its entirety. Requiring a court mechanically to first examine the duty of fair representation when it might be evident that the hybrid claim will not survive because there is no claim for breach of contract is a waste of judicial resources.

C. There Is No Conflict Among the Circuits Regarding the Order in Which the Claims Must Be Considered in Analyzing Hybrid Claims.

There is no conflict among the circuits regarding the order in which claims in a hybrid cause of action must be considered. Petitioner relies on language from *Thompson* for the proposition that in a hybrid claim, the court must first decide

whether the Union breached its duty of fair representation before it considers whether there was a breach of the collective bargaining agreement. (Petition at 10-11.) Petitioner's reliance on this isolated passage of *Thompson* is wrong for two independent reasons.

First, Petitioner is reading this language out of context. In *Thompson*, the Fourth Circuit also held that "in order to prevail on the merits against either party, an employee must prove both (1) that the union breached its duty of fair representation and (2) that his employer violated the collective bargaining agreement." 276 F.3d at 656 (*citing DelCostello*, 462 U.S. at 164-65). The court also recognized that "Thompson's claims against the Union and Alcoa are 'interlocked: neither claim is viable if the other fails.'" *Id.* at 657 (*quoting Crider*, 130 F.3d at 1241). The passage on which Petitioner relies (*id.*) thus occurs in almost the same judicial breath in which the court notes the wholly interdependent nature of the two claims.

Second, Petitioner's reliance on *Thompson* is wholly misplaced; in *Thompson* itself, the Fourth Circuit made clear that it was not suggesting the rule advocated by Petitioner. The Fourth Circuit noted that in a proper case, the district court could properly resolve a hybrid section 301/fair representation claim in precisely the manner objected to by Petitioner:

> Though we decline to do so here, where a court is well able to decide that the employee's contractual claim lacks merit as a matter of law, it is appropriate for the court to decide the case on that issue.

Id. at 657 n.7. Simply put, the Fourth Circuit resolved *Thompson* in the same manner federal courts have routinely resolved hybrid section 301/fair representation cases: It decided the case on the basis of the claim most readily resolved which fully decided the matter. There is no split within the

circuits.[2] When properly analyzed, Petitioner's position is without any support whatsoever.

II. The Ninth Circuit Correctly Determined That the District Did Not Abuse Its Discretion in Applying the Rules of Evidence to Strike Portions of Petitioner's Affidavit.

Petitioner inappropriately requests that this Court grant certiorari concerning an evidentiary issue and disturb the Ninth Circuit's affirmation that the district court did not abuse its discretion in striking portions of Petitioner's affidavit. It is well settled that rulings on evidentiary issues, specifically including a district court's ruling on a motion to strike, are reviewed for an abuse of discretion. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) ("We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings."); *Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997) (same); *Snake River Valley Elec. Asso'n v. PacifiCorp*, 357 F.3d 1042, 1052 n.11 (9th Cir. 2004) (appellate courts review district court's rulings on evidentiary issues for abuse of discretion); *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217, 1224 n.4 (9th Cir. 2005) (*citing El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1038 (9th Cir. 2003)). Absent a clear abuse of discretion, a district court's evidentiary rulings are not reversible. *McGonigle v. Combs*, 968 F.2d 810, 818 n.6 (9th Cir. 1992). "Discretion is abused when the judicial action is arbitrary, fanciful or unreasonable or where no reasonable man [or woman] would take the view adopted by the trial

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[2] Verizon notes that the Fourth Circuit has not followed the supposed "rule" identified by Petitioner. *See Taylor v. Siemens VDO Auto. Corp.*, 157 F. App'x. 557, 2005 WL 2952232 (4th Cir. 2005) (unpublished) (affirming dismissal of hybrid claim after first determining that employer did not breach collective bargaining agreement).

court." *El Pollo Loco, Inc.*, 316 F.3d at 1041 (internal quotation marks and citation omitted; brackets in original).

The Ninth Circuit correctly concluded that the district court did not abuse its discretion when it applied the rules of evidence to strike certain portions of Petitioner's affidavit. In her affidavit, Petitioner made statements that she could have learned the needed skills, including MARK—a computer program which was a necessary part of the job into which she sought to bump—in one week. There was uncontroverted evidence in the record that MARK requires a three-week training class, and Petitioner also admitted in her deposition that she had no knowledge of MARK. In applying Rule 56(e) of the Federal Rules of Civil Procedure, the district court found:

> Affiant in this case has no personal knowledge that she could be trained in less time than asserted is necessary by Verizon. Rather, she believed she could learn all the skills in one week. This "belief" does not appear to be based on any evidence other than Ms. Bliesner had been an employee for a long period of time, therefore, she felt she could learn the necessary skills. While the Court does not doubt that Ms. Bliesner could have eventually learned the necessary skills, the facts are undisputed that the time required to learn all of the undisputed essential and necessary skills for the . . . position would exceed one week and the one-week time limit was a condition that must be satisfied before a bump request could be approved for the . . . position. Ms. Bliesner's affidavit statements that she believed she could learn in one week all the skills, without more (such as evidence the MARK training only takes a week instead of 3-4 weeks or other employees had completed such training in one week . . .) does not provide the specific facts required under Rule 56(e) necessary to create a basis for her "belief." The statements are conclusory and insufficient as a matter of law to survive summary judgment on this issue of whether she could be trained within one week.

(Appendix A to Petition at 9.) Based on the record, the district court's ruling was not "arbitrary, fanciful or unreasonable." The Ninth Circuit appropriately found that the district court did not abuse its discretion in striking those portions of Petitioner's affidavit (for lack of personal knowledge) concerning her own belief that she could be trained in a week.

Petitioner's reliance on cases such as *United States v. Rodriguez*, 162 F.3d 135 (1st Cir. 1998) is completely misplaced. Federal Rule of Evidence 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Even when such personal knowledge is expressed in terms of inferences or opinions, that testimony must still be "'grounded on personal observations and experience.'" *Rodriguez*, 162 F.3d at 144 (citation omitted). Here, the district court was well within its discretion to conclude that whatever Petitioner's experience as a Verizon employee, she had no experience whatsoever with the MARK or SODA computer systems. Her opinion about how long it would take her to learn those systems could not be based on her own observations and experience. On the other hand, the observations of managers who supervise employees going through that training are based on personal knowledge as to the length of time that training takes. The district court was correct and did not abuse its discretion to exclude Petitioner's proffered testimony for lack of personal knowledge and to permit the relevant manager's testimony.

III. The Petition Is Futile, Because Verizon Did Not Violate the Collective Bargaining Agreement.

As set forth above, under well-settled law, Petitioner must establish both a breach of the collective bargaining agreement and a violation of the duty of fair representation to succeed on her claim. As both the district court and the Ninth Circuit concluded, under the unambiguous provisions of the collective bargaining agreement, Verizon did not violate the con-

tract. Thus Petitioner cannot prevail, and her substantive complaint concerning the order in which her claims are analyzed is fundamentally pointless.

The collective bargaining agreement is wholly unambiguous: A person seeking to bump into a position must have the qualifications to perform the job, or be able to "easily acquire the qualifications" as set forth in the agreement. Collective bargaining agreement, § 14.5.1 (Appendix A to Petition at 9a). To easily acquire the qualifications, the employee would be given "refresher" training on the job for up to one week. Collective bargaining agreement, § 14.5.2 (Appendix A to Petition at 9a.) The collective bargaining agreement contains an exception to the "refresher" nature of the training, but that was limited to positions for which "the requirements of the job . . . can be readily learned without formal training." *Id.* Given the undisputed evidence that there were formal classes for several of the skills needed for the position into which Petitioner sought to bump, the exception to the requirement that training be only "refresher" is irrelevant. Even if it were at issue, however, the exception still only permitted one week of on-the-job training. (*Id.* at 9a-10a.)

The undisputed evidence before the district court—drawn from Petitioner's own sworn deposition testimony—demonstrated that she had *no* experience whatsoever with several of the needed qualifications for the job into which she was attempting to bump:

1. The MARK computer system;
2. The SODA computer system;
3. The processing of expense vouchers;
4. Updating EIRs;[3]

[3] Employee Information Records, Verizon's formal documents for maintaining personnel information.

5. Updating performance reviews;

6. Handling absence control procedures;

7. Processing Family Medical Leave Act requests.

Additionally, it was similarly undisputed that Petitioner had only limited experience with:

1. The computer program Lotus 1-2-3;

2. The computer program SES;

3. The computer program WordPerfect; and

4. The generation of company correspondence.

Appendix A to Petition, at 11a

The undisputed evidence was that the necessary training programs to learn just *some* of these skills would take several weeks. Specifically, the SODA system alone required a one-day class. The MARK system alone required a formal class of three to four weeks. The system to pay bills and process expense vouchers, alone, required a few weeks of training. *Id.*

Given that the position into which Petitioner sought to bump required formal training, the exception—permitting initial on-the-job training—was not applicable. Because Petitioner would have required initial training, not refresher training, her bump was properly denied.

Thus, the district court and the Ninth Circuit reached the correct result, regardless of the district court's ruling on the motion to strike Petitioner's opinion testimony. Petitioner's baseless belief that she could have learned all these skills in one week is irrelevant. Because Petitioner admits that she would have had to learn these skills as an *initial* matter, this was not "refresher" training as permitted by the collective bargaining agreement, and Petitioner's bump was properly denied.

Finally, Verizon did not violate the collective bargaining agreement, even if Petitioner were to be permitted initial on-the-job training. This is true for at least two reasons. First, even if the Court were to credit Petitioner's unfounded opinion that she could learn within one week how to use systems she had never used before, which normally require weeks worth of training, that opinion misses the point. It is undisputed that several of those skills require formal classwork, not on-the-job training. On-the-job training is all that the CBA permits. Second, the district court opinion focused on the MARK and SODA systems. Learning each of those two systems involved formal classes, of three to four weeks and one day, respectively. It was undisputed, however, that Petitioner was deficient on no less than *five* other skills, all of which she admitted she had never done before. (*Id.* at 11a.) As set forth above, the district court did not abuse its discretion in striking—for a complete lack of personal knowledge—Petitioner's conclusory assertion that she could learn this mass of wholly new skills within one week. Similarly, Verizon did not violate the collective bargaining agreement in so concluding.

Simply put, as a matter of undisputed fact Verizon was correct to deny Petitioner's bump request. Because Verizon did not violate the collective bargaining agreement, Petitioner's hybrid claim is barred. *DelCostello*, 462 U.S. at 164-65. The Petition is therefore futile.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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Verizon Northwest, Inc.

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No. 06-1073

IN THE

Supreme Court of the United States

KATHY BLIESNER,
Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA,
AND VERIZON NORTHWEST, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION ON BEHALF OF THE UNION RESPONDENT

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STATUTE

29 U.S.C. § 185 5

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Respondent Communications Workers of America, AFL-CIO, submits this brief in opposition to the petition for certiorari.

STATEMENT

The instant case arises out of an unsuccessful attempt by the Petitioner, Kathy Bliesner, to displace a junior co-worker in order to avoid being laid-off from employment at Verizon Northwest, Inc. Pet. App. 2a. The collective bargaining agreement between Verizon and the Communications Workers of America ("CWA") would have allowed Petitioner to displace the junior employee if, but only if, the Petitioner possessed the

qualifications to perform the junior employee's job or could acquire those qualifications with one week of training. *Ibid.* Verizon determined that the Petitioner neither possessed the necessary qualifications nor could acquire those qualifications with one week's training and therefore denied her request to bump the junior employee. *Id.* at 3a-4a.

CWA filed a grievance on Petitioner's behalf. Pet. App. 4a. The third and final pre-arbitration step of the grievance procedure was completed in March 1996. *Ibid.* CWA Local 7670 handled the grievance through the first three steps of the procedure; thereafter the grievance was handled by a representative of the CWA national union. Ninth Circuit Excerpts of Record 51.

In order to meet the contractual time limits, the national CWA representative requested arbitration in April 1996 without first investigating the merits of the grievance. Ninth Circuit Excerpts of Record 51. Upon later investigating the merits of the grievance, the national CWA representative determined that the grievance would not be sustained at arbitration. *Id.* at 52-53. After making a number of unsuccessful attempts to settle the grievance, the national CWA representative informed the Petitioner of his decision not to take the grievance to arbitration. *Ibid.* Petitioner exercised her right as a CWA member to appeal that decision within the Union, and at the final step of the appeal procedure it was decided that the Union would continue to process the grievance to arbitration. *Ibid.*

At the arbitration hearing, Verizon took the position that CWA had not requested arbitration in a timely fashion. Ninth Circuit Excerpts of Record 34, 44-45, 970. Based on his assessment that the Company had failed to adequately prove its timeliness defense, the attorney representing CWA at the arbitration made a tactical decision not to put on any evidence concerning that issue. *Id.* 954-955, 971. However, the arbitrator found that the Union had not processed the grievance to arbitration until March 2001 and on that basis dismissed the

grievance as untimely. *Id.* 286. The Union filed two unsuccessful motions requesting the arbitrator to reconsider his decision on the ground that the Company had not adequately proven its timeliness defense. Pet. App. 5a & n. 2.

The Petitioner thereafter brought suit alleging that Verizon had breached the collective bargaining agreement by denying her request to bump the junior employee and that CWA had breached its duty of fair representation in handling her grievance. Pet. App. 5a.

It was undisputed that the Petitioner lacked the following qualifications for the job she sought:

> "she had no training or experience of any kind in MARK and SODA systems, the processing of expense vouchers, updating EIR's and performance reviews" and "she had limited experience with Lotus 1-2-3, had not used telemail, she was unfamiliar with the basic functions of SES, [had] limited experience with WordPerfect, she had not generated different kinds of company correspondence since the 1980s, she had no experience handling absence control procedures and she had no experience processing Family Medical Leave Act requests." Pet. App. 11a (quotation marks and footnote omitted).

The only dispute concerned whether one week of training could remedy these deficiencies. As to the disputed training issue, the Company presented an affidavit stating:

> "the training time for SODA is a one-day basic training class. The training time for a working knowledge of the MARK systems is a formal class that lasts 3 to 4 weeks and such skills are essential for the Moscow position. The training time for learning the system to pay bills and process expense vouchers is a few weeks." Pet. App. 11a.

In response, the Petitioner submitted an affidavit that asserted generally "the skills necessary to perform said tasks could easily be learned by me in one week or less." *Ibid.*

The district court concluded that "Ms. Bliesner's statements that she could have been trained in one week or less are conclusory, self-serving and do not create a material issue of genuine fact to survive summary judgment." Pet. App. 12a. "Because the applicable language of the union contract [wa]s unambiguous and the evidence . . . [wa]s undisputed that Ms. Bliesner could not have been trained for the position she was requesting to bump into within one-week, the Court f[ound] there [wa]s no genuine issue of material fact regarding the alleged violation of the CBA by Verizon" and that "Verizon did not violate the CBA." *Id.* at 13a-14a.

Having found that the Petitioner "failed to survive summary judgment as to her claim against Verizon," the court found that "her claim against the union also fails." Pet. App. 14a. The court concluded that it "need not address the union's alleged failure to timely process the request to arbitrate as there is no merit [to] Plaintiff's underlying claim of being improperly denied her request to bump." *Ibid.*

The Petitioner appealed the district court's grant of summary judgment principally on the ground "that the district court erred by deciding that Verizon did not breach the CBA without first deciding whether CWA breached its duty of fair representation." Pet. App. 29a. The court of appeals concluded that "nothing requires the district court to decide the fair representation question first" and that "[d]eciding the CBA question first is . . . a normal and entirely sensible procedure frequently followed by a court confronted with two potentially dispositive questions, one of which is easier to resolve." *Id.* at 29a-30a.

ARGUMENT

The Ninth Circuit decision below follows directly from the principles stated by this Court in *DelCostello v. Teamsters*, 462 U.S. 151, 164-165 (1983), and *Teamsters Local 391 v. Terry*, 494 U.S. 558, 564 (1990), and is in accord with the First, Sixth and Seventh Circuits' application of the teachings of

DelCostello and *Terry* to cases like this one. The Petitioner's claim that the decisions of these circuits conflict with the Fourth Circuit's decision in *Thompson v. Aluminum Company of America*, 276 F.3d 651 (2002), Pet. 7-8, is entirely without substance: *Thompson* did not present the same issue as this case and the *Thompson* opinion, in treating with the issue presented there, endorsed the approach followed by the Ninth Circuit in deciding this case and by the First, Sixth and Seventh Circuits in deciding cases identical to this one. The Petitioner's claim that the decisions below conflict with *Breininger v. Sheet Metal Workers*, 493 U.S. 67 (1989), Pet. 8-9, is equally without substance as *Breininger* addresses an entirely different question.[1]

1. Section 301 of the Labor Management Relations Act of 1947 provides for "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." 29 U.S.C. § 185. Suits, such as that brought by the Petitioner, alleging that an employer has breached its collective bargaining agreement and that a union has breached its duty of fair representation in seeking to redress the employer's breach through the contractual grievance-arbitration procedures are known as "hybrid § 301/fair representation suits." Pet. App. 8a.

This Court has described the nature of a hybrid § 301/fair representation suit as follows:

> "Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective-bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. Yet the two claims are inextricably interdependent.

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[1] Because the petition for certiorari does not even pretend that the third and fourth questions presented are independently worthy of review in this Court, Pet. 9-10, we address only the first two questions presented.

> To prevail against either the company or the Union, employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both." *DelCostello v. Teamsters*, 462 U.S. 151, 164-165 (1983) (ellipses, brackets, quotation marks, citations and footnote omitted).

In *Teamsters Local 391 v. Terry*, 494 U.S. 558, 564 (1990), the Court relied upon the above passage from *DelCostello* in describing what a plaintiff must prove in order to prevail in a hybrid § 301/fair representation suit:

> "Whether the employee sues both the labor union and the employer or only one of those entities, he must prove the same two facts to recover money damages: that the employer's action violated the terms of the collective-bargaining agreement and that the union breached its duty of fair representation."[2]

Applying the teaching of *DelCostello* and *Terry* that the same two facts must be proved to recover against either the employer or the union in a hybrid § 301/fair representation suit, every court of appeals decision to have addressed the issue holds that it is proper for a district court to dismiss such suits upon determining that the employer's action did not violate the terms

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[2] The *Terry* Court relied on the fact that an employee bringing a hybrid § 301/fair representation suit must prove both an employer contract breach and a union fair representation breach in holding that "an employee who seeks relief in the form of backpay for a union's alleged breach of its duty of fair representation has a right to trial by jury." *Id.* at 561. The fact that both breaches have to be shown was relevant to the jury trial issue, because "[w]hen viewed in isolation, the duty of fair representation issue is analogous to a claim against a trustee for breach of fiduciary duty" as to which there is no Seventh Amendment right to a trial by jury but "[t]he § 301 issue . . . is comparable to a breach of contract claim—a legal issue" as to which there is a right to trial by jury. *Id.* at 569-570.

of the collective bargaining agreement and without determining whether the union breached its duty of fair representation. *See Mulvihill v. Top-Flite Golf Co.*, 335 F.3d 15, 27 (1st Cir. 2003) ("Our conclusion that Spalding did not breach the CBA when it terminated Mulvihill's employment serves to dispose of his case against the Union as well."); *Talbot v. Matthews Distrib. Co.*, 961 F.2d 654, 664 (7th Cir. 1992) ("Because the plaintiffs failed to prove an essential element of their hybrid claim [i.e., that the employer "breached its collective bargaining agreement"], the district court [correctly] found it unnecessary to determine whether the Union breached its duty of fair representation in grieving the plaintiffs' breach of contract claim."); *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559 (6th Cir. 1990) ("[I]f the first claim anchored in the employer's alleged breach of the collective bargaining agreement fails, then the breach of duty of fair representation claim against the union must necessarily fail with it.").

As the court of appeals observed, this approach is proper both as a matter of the governing substantive law and as a matter of sound judicial administration:

> "Evidently believing that the CBA § 301 question was easier to resolve, the district court held that Verizon had not violated the CBA. Having held that there was no violation of the CBA, the district court then granted summary judgment to both defendants on the ground that Bliesner had not prevailed on an essential element of her suit. Deciding the CBA question first is not merely permissible. It is also a normal and entirely sensible procedure frequently followed by a court confronted with two potentially dispositive questions, one of which is easier to resolve." Pet. App. 29a-30a.

2. *Thompson v. Aluminum Company of America*, 276 F.3d 651 (4th Cir. 2002), upon which the Petitioner principally relies, Pet. 7-8, is not in conflict with either the Ninth Circuit's

decision here or the decisions of the First, Sixth and Seventh Circuits.

In the first place, *Thompson* did *not* present the question of whether it is proper for a district court to dismiss a hybrid § 301/fair representation suit upon determining that the employer's action did not violate the terms of the collective bargaining agreement and without determining whether the union breached its duty of fair representation. The district court in *Thompson* determined *both* that the union had not breached its duty of fair representation *and* that the employer had not breached its collective bargaining agreement, and the Fourth Circuit expressly endorsed *both* of those determinations. 276 F.3d at 654 ("there is no evidence to support Thompson's claim against the Union for breach of its duty of fair representation") & 658 ("we agree with the district court's conclusion that Thompson cannot show Alcoa breached the collective bargaining agreement").

Beyond that, in deciding the issue presented in *Thompson*, the Fourth Circuit confirmed that a hybrid § 301/fair representation suit should be dismissed once a court determines that the plaintiff has failed to prove *either* of the two essential elements of a hybrid claim. The *Thompson* decision begins from the proposition that in "a so-called 'hybrid 301' action, . . . in order to prevail on the merits against either party, an employee must prove *both* 1) that the union breached its duty of fair representation and 2) that his employer violated the collective bargaining agreement." 276 F.3d at 656 (emphasis in original). Since the "claims against the Union and [the Employer] are 'interlocked[,] neither claim is viable if the other fails.'" *Id.* at 657, quoting *Crider v. Spectrulite Consortium, Inc.*, 130 F.3d 1238, 1241 (7th Cir. 1997). And, it followed that the trial court's "conclusion that the Union did not breach its duty of fair representation resolve[d] the case for [the Employer] as well." *Id.* at 658.

In an effort to manufacture a circuit conflict out of *Thompson*, the Petitioner relies entirely on that opinion's explanation that a

court will generally "first address the claim against the Union, because federal courts review allegations against employers for breach of collective bargaining agreements *only* when an employee has first proved that the union representing breached its duty of fair representation." 276 F.3d at 657 (emphasis in original).[3] *See* Pet. 7. That explanation is far from a holding that the claim against the union *must always* be addressed first. Indeed, the *Thompson* opinion states that "where a court is well able to decide that the employee's contractual claim lacks merit as a matter of law, it is appropriate for the court to decide the case on that issue." *Id.* at 657 n. 7.

In context, then, what the Fourth Circuit clearly meant in the statement from *Thompson* relied upon by the Petitioner is that, where the contractual claim is not clearly meritless, the district court should first address whether there has been a fair representation breach in determining whether to dismiss a hybrid § 301/fair representation suit.

3. After unsuccessfully attempting to show a circuit conflict, the Petitioner goes on to claim that "the Ninth Circuit's decision [in this case] was in direct conflict with the prior decisions of this Court in *Breininger* and *DelCostello*." Pet. 8-9. That contention is no more substantial than the Petitioner's circuit conflict claim.

To begin, *Breininger* did *not* involve a hybrid § 301/fair representation claim at all. Rather, the issue in *Breininger* was whether "[t]he absence of a § 301 claim . . . requires that . . . the NLRB possesses exclusive jurisdiction over [a] fair representation suit." 493 U.S. at 82. While acknowledging that such a pure fair representation claim is "entirely different" than a

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[3] That the *Thompson* court did not consider finding a union fair representation breach to be a jurisdictional prerequisite to considering the contract claim is demonstrated by the fact that the court went on to find the employee's contract claim meritless after first having determined that the union did not breach its fair representation duty. *Id.* at 658-659.

hybrid § 301/fair representation claim, the *Breininger* Court nevertheless held that "[f]ederal courts have jurisdiction to hear fair representation suits whether or not they are accompanied by claims against employers." *Id.* at 82-83. Thus, *Breininger* has nothing to do with what a plaintiff must prove in order to prevail in a hybrid § 301/fair representation case like this one or what issue a court must decide in order to dismiss such a case.

It is this Court's post-*Breininger* decision in Teamsters *Local 391 v. Terry, supra,* that defines what a plaintiff must prove in order to prevail in a hybrid § 301/fair representation suit. *Terry*, relying on *DelCostello*, holds that an employee must "prove *the same two facts* to recover" against either the union or the employer in a hybrid § 301/fair representation case: "that the employer's action violated the terms of the collective-bargaining agreement *and* that the union breached its duty of fair representation." 494 U.S. at 564 (emphasis added). The fact that *Terry* relied exclusively upon *DelCostello* as establishing this proposition belies the Petitioner's claim that the decisions below – which do nothing more than faithfully and sensibly apply this rule—conflict with *DelCostello.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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